

IN THE U.S. DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF OHIO  
EASTERN DIVISION

KENNY TOUVELL,

CASE NO. 2:22-cv-3333

Plaintiff,

vs.

CIRCLE K STORES INC., *et al.*,

**DEFENDANT DART CONTAINER  
CORPORATION'S NOTICE OF  
REMOVAL**

Defendants.

TO: THE JUDGES OF THE UNITED STATES DISTRICT COURT FOR THE  
SOUTHERN DISTRICT OF OHIO, EASTERN DIVISION

1. Defendant Dart Container Corporation (“Dart”) is a Defendant in a civil action brought against it in the Court of Common Pleas for Muskingum County, Ohio, styled *Kenny Touvell v. Circle K Stores Inc., et al.*, Case No. CC2022-0223. Copies of all process and pleadings in that action are attached hereto as Exhibit A, pursuant to 28 U.S.C. §1446(A).
2. Said action was commenced by attempted service of the Complaint on Dart on August 11, 2022.
3. Plaintiff is a resident of the State of Ohio.
4. Dart is a foreign corporation organized, registered and existing under the laws of the State of Nevada and has its principal place of business in the State of Michigan.
5. Co-Defendant Mac’s Convenience Stores, LLC, improperly identified in the Complaint as “Circle K Stores Inc.” is a foreign limited liability company with its principal place of business in the State of Indiana and organized and existing under the State of Delaware. Both at the time of the commencement of the State Court Action and at the present time, the Defendant, Mac’s Convenience Stores LLC, was a single-member limited liability company with its sole

member being Couche-Tard U.S. Inc. Couche-Tard U.S. Inc. is a Delaware corporation with its principal place of business in Tempe, Arizona. Accordingly, Defendant is a citizen of Delaware and Arizona only. Cosgrave v. Bartolotta, 150 F.3d 729, 731 (7th Cir. 1998) (holding that the citizenship of a limited liability company is the citizenship of each of its members). The only relevant inquiry for the purpose of determining citizenship of a limited liability company is the citizenship of each of its members, as explained by Cosgrave:

The principal defendant is Joseph Bartolotta, but his company—Mary-Bart, LLC—is also named as a defendant; and in a diversity case, whenever there is an unconventional party (that is, someone or something other than either a natural person suing in his own rather than a representative capacity, or a business corporation) a jurisdictional warning flag should go up. ... Mary-Bart is neither a partnership nor a corporation, but a “limited liability company.” [W]e conclude that the citizenship of an LLC for purposes of the diversity jurisdiction is the citizenship of its members.

Cosgrave, 150 F.3d at 731 (internal citations omitted). Co-Defendant Mac’s Convenience Stores, LLC consents to the removal of this action.

6. The within lawsuit is a controversy between citizens of different states, as to give rise to complete diversity of citizenship within the meaning of 28 U.S.C. §1332.
7. Plaintiff demands judgment against Defendants in an amount in excess of \$25,000.00, along with attorney fees and court costs. According to the Complaint, Plaintiff alleges he suffered “...serious injuries, including but not necessarily limited to second and third degree burns. Plaintiff further alleges he has incurred medical expenses as a result of this incident and may incur further medical expenses in the future. Finally, Dart requested Plaintiff that he stipulate that his damages do not exceed \$75,000.00. However, to date Plaintiff has not agreed to any such stipulation. As such, it is Dart’s good faith belief that the amount in controversy exceeds the jurisdictional amount of \$75,000.00, exclusive of interest and costs, if all of

Defendants' defenses fail and if Plaintiff proves all of his claimed damages as alleged in the Complaint.

8. This is a civil action brought in a state court in which the United States District Court has original jurisdiction because of diversity of citizenship, and no Defendant is a citizen of the State of Ohio, in which this action was brought.

9. Written notice of removal of this action has been given simultaneously herewith to Plaintiffs' counsel and the Clerk of Courts for Muskingum County, Ohio.

WHEREFORE, Defendant Dart Container Corporation hereby removes this action from the Court of Common Pleas for Muskingum County, Ohio, to this Court, pursuant to 28 U.S.C. §1441.

Respectfully submitted,

*/s/ Nicholas P. Resetar*

Nicholas P. Resetar (0086507)

[nresetar@ralaw.com](mailto:nresetar@ralaw.com)

Roetzel & Andress, LPA

625 Eden Park Drive, Suite 450

Cincinnati, Ohio 45202

Telephone: 513.361.0200

Faxsimile: 513.361.0335

**ATTORNEYS FOR DEFENDANT  
DART CONTAINER CORPORATION**

**PROOF OF SERVICE**

A copy of the foregoing was served on this 2<sup>nd</sup> day of September, 2022 electronically by way of the Clerk's electronic filing system .

*/s/ Nicholas P. Resetar*  
Nicholas P. Resetar

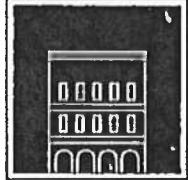
FILED  
COMMON PLEAS COURT  
MUSKINGUM CO.OHIO  
2022 AUG -3 AM 9:51  
WENDY L. SOWERS  
CLERK

IN THE COMMON PLEAS COURT, MUSKINGUM COUNTY, OHIO  
GENERAL DIVISION

KENNY TOUVELL ) CASE NUMBER CC2022-0223  
10 OLD RIX MILLS RD. )  
APT. B2 )  
NEW CONCORD, OH 43762 ) JUDGE  
PLAINTIFF ) JUDGE FLEEGLE  
V )  
CIRCLE K STORES INC. )  
STATUTORY AGENT )  
CORPORATION SERVICE COMPANY )  
3366 RIVERSIDE DRIVE )  
SUITE 103 )  
UPPER ARLINGTON, OH 43221 )  
AND ) COMPLAINT  
DART CONTAINER CORPORATION ) (WITH JURY DEMAND  
2148 DEPOT STREET ) ENDORSED)  
HOLT, MICHIGAN 48842 )  
DEFENDANTS )

FIRST CAUSE OF ACTION

1. On August 4, 2020, Plaintiff was a customer at Defendant Circle K Stores, Inc., hereinafter referred to as Defendant Circle K, store located at 60 W. Main St., New Concord, Ohio, located within the territorial jurisdiction of this Court.
2. On that date, Plaintiff purchased coffee which was contained within a coffee cup provided by Defendant Circle K to him for his use in drinking the coffee.
3. The bottom fell out of the cup as a result of which Plaintiff suffered serious injuries, including but not necessarily limited to second and third degree burns.

  
GOTTLIEB, JOHNSTON,  
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Attorneys At Law  
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43702-0190  
(740) 452-7555  
FAX (740) 480-1664  
www.ZanesvilleLaw.com



4. Defendant Circle K was negligent in that they failed to ensure that a defective cup would not be included in the inventory so that customers would be exposed to the risk of using a defective cup and suffering serious injury, including burns.
5. Defendant Circle K was also negligent in failing to include adequate warning as to the temperature of the coffee which was unreasonably hot under the circumstances.
6. As a direct and proximate result of the negligence of Defendant Circle K Plaintiff has suffered serious injuries, including, but not necessarily limited to, second and third degree burns.
7. Plaintiff's injuries may be permanent in nature, have been painful, and disabling.
8. As a direct and proximate result of the negligence of Defendant Circle K, Plaintiff has been caused to incur expense to the care and treatment of his injuries and may incur further expense in the future.

#### SECOND CAUSE OF ACTION

9. Plaintiff incorporates the allegations set forth in the first cause of action as though fully rewritten herein.
- 10.Upon information and belief, Defendant Dart Container Corporation, hereinafter referred to as Defendant Dart was the manufacturer of the cup provided to the Plaintiff by Defendant Circle K as set forth in the first cause of action.
- 11.The subject coffee cup was defective because of the negligent manufacture of said cup by Defendant Dart.
- 12.Defendant Dart is responsible for the injuries suffered by the Plaintiff because of their negligent manufacture of the coffee cup provided to Plaintiff for his use on August 4, 2020.
- 13.The coffee cup manufactured by Defendant Dart, provided to Plaintiff was unreasonably dangerous for its intended use in that it was defective as a

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result of which the bottom fell out of causing the coffee to spill on the Plaintiff and causing Plaintiff to suffer serious injuries, including but not necessarily limited to second and third-degree burns.

14. As a direct and proximate result of the negligent manufacture of the subject coffee cup by Defendant Dart and said Defendant providing that coffee cup to Defendant Circle K for use by customers when it was unreasonably dangerous for such use, Plaintiff suffered the serious injuries stated above.
15. As a further direct and proximate result of the negligent manufacture of the coffee cup and Defendant Dart providing said coffee cup for use by customers when it was unreasonably dangerous, Plaintiff has been caused to incur expense for the care and treatment of his injuries and may incur further expense in the future.

Wherefore, Plaintiff demands judgment against the Defendants, jointly and severally, in a sum in excess of \$25,000 sufficient to compensate him for his injuries and damages, for attorney fees, court costs, and for such further legal and equitable relief to which the Plaintiff shall be entitled.



---

Miles D. Fries (0016415)  
Attorney for Plaintiff  
GOTTLIEB, JOHNSTON, BEAM  
& DAL PONTE, P.L.L.  
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REQUEST FOR SERVICE

**TO THE CLERK:** Please issue a Summons, a copy of the Complaint and all ancillary documents upon Defendant Circle K Stores, Inc. by personal service by process server Chris Wise and make the same returnable according to law. Please issue a Summons, a copy of the Complaint and all ancillary documents upon Defendant Dart Container Corporation, by certified mail and make the same returnable according to law.

Miles D. Fries (0016415)  
Attorney for Plaintiff

**GOTTLIEB, JOHNSTON,  
BEAM & DAL PONTE, PLL**

Attorneys At Law  
Legal Arts Building  
320 Main Street  
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**Court of Common Pleas, Muskingum County, Zanesville, Ohio**

**S U M M O N S**

Rule 4 1970 Ohio Rules of Civil Procedure

Case Number **CC2022-0223**

**KENNY TOUVELL  
10 OLD RIX MILLS ROAD, APT B2  
NEW CONCORD, OH 43762**  
Plaintiff(s)

vs.

**Summons on Complaint**

**CIRCLE K STORES INC  
Corporation Service Company, Stat Agt  
3366 RIVERSIDE DIRVE, STE 103  
COLUMBUS, OH 43221**  
Defendant(s)

To the above named defendant(s):

You are hereby summoned that a complaint (a copy of which is attached and made a part hereof) has been filed against you in this court by the plaintiff(s) named herein.

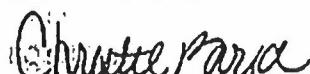
You are required to serve upon the plaintiff(s) attorney, or upon the plaintiff(s) if (s)he has no attorney of record, a copy of your answer to the complaint within 28 days after service of this summons upon you, exclusive of the day of service. Said answer must be filed with this court within three days after service on plaintiff(s) attorney.

The name and address of the plaintiff(s) attorney is as follows:

MILES D FRIES  
Gottlieb Johnston, Beam & Dal Ponte, PLL  
PO BOX 190 / 320 MAIN ST  
ZANESVILLE, OH 43702

If you fail to appear and defend, judgment by default will be taken against you for the relief demanded in the complaint.

Wendy L. Sowers  
Clerk of Courts

Christie Boyd, Deputy Clerk

Date August 3, 2022

**Return of Service of Summons**

***Personal***

I received this summons on \_\_\_\_\_, 20\_\_\_\_ and made personal service of it upon \_\_\_\_\_ by locating \_\_\_\_\_ and tendering a copy of summons and accompanying documents on \_\_\_\_\_, 20\_\_\_\_.

***Residence***

I received this summons on \_\_\_\_\_, 20\_\_\_\_ and made personal service of it upon \_\_\_\_\_ by leaving, at usual place of residence with \_\_\_\_\_ a person of suitable age and discretion then residing therein, a copy of the summons, a copy of the complaint and accompanying documents, on \_\_\_\_\_, 20\_\_\_\_.

***Failure of Service***

I received this summons on \_\_\_\_\_, 20\_\_\_\_ with instructions to make personal-residence service upon the defendant(s) \_\_\_\_\_  
\_\_\_\_\_ and I was unable to serve a copy of the summons upon \_\_\_\_\_ for the following reasons: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_.

\*\*Corrected Service Address (if served at different address): \_\_\_\_\_  
\_\_\_\_\_.

Service By: \_\_\_\_\_  
Sheriff Deputy/Process Server/Deputy Clerk (circle one)

***Fees***

Service \$\_\_\_\_\_ Mileage \$\_\_\_\_\_ Total \$\_\_\_\_\_ Date \_\_\_\_/\_\_\_\_/20\_\_\_\_.

**Court of Common Pleas, Muskingum County, Zanesville, Ohio**

**S U M M O N S**

Rule 4 1970 Ohio Rules of Civil Procedure

Case Number **CC2022-0223**

**KENNY TOUVELL  
10 OLD RIX MILLS ROAD, APT B2  
NEW CONCORD, OH 43762**  
Plaintiff(s)

vs.

**Summons on Complaint**

**DART CONTAINER CORPORATION  
2148 DEPOT STREET  
HOLT, MI 48842**

Defendant(s)

To the above named defendant(s):

You are hereby summoned that a complaint (a copy of which is attached and made a part hereof) has been filed against you in this court by the plaintiff(s) named herein.

You are required to serve upon the plaintiff(s) attorney, or upon the plaintiff(s) if (s)he has no attorney of record, a copy of your answer to the complaint within 28 days after service of this summons upon you, exclusive of the day of service. Said answer must be filed with this court within three days after service on plaintiff(s) attorney.

The name and address of the plaintiff(s) attorney is as follows:

MILES D FRIES  
Gottlieb Johnston, Beam & Dal Ponte, PLL  
PO BOX 190 / 320 MAIN ST  
ZANESVILLE, OH 43702

If you fail to appear and defend, judgment by default will be taken against you for the relief demanded in the complaint.

Wendy L. Sowers  
Clerk of Courts





Christie Boyd, Deputy Clerk

Date August 3, 2022

**Return of Service of Summons**

***Personal***

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***Residence***

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***Failure of Service***

I received this summons on \_\_\_\_\_, 20\_\_\_\_ with instructions to make personal-residence service upon the defendant(s) \_\_\_\_\_ and I was unable to serve a copy of the summons upon \_\_\_\_\_ for the following reasons: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

\*\*Corrected Service Address (if served at different address): \_\_\_\_\_  
\_\_\_\_\_

Service By: \_\_\_\_\_  
Sheriff Deputy/Process Server/Deputy Clerk (circle one)

***Fees***

Service \$\_\_\_\_\_ Mileage \$\_\_\_\_\_ Total \$\_\_\_\_\_ Date \_\_\_\_/\_\_\_\_/20\_\_\_\_.

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Label #1

CC2022-0223  
9414 7266 9904 2200 6231 3  
DART CONTAINER CORPORATION  
2148 DEPOT STREET  
HOLT, MI 48842

Label #2

CC2022-0223  
9414 7266 9904 2200 6231 3  
DART CONTAINER CORPORATION  
2148 DEPOT STREET  
HOLT, MI 48842

Label #3

CC2022-0223  
9414 7266 9904 2200 6231 3  
DART CONTAINER CORPORATION  
2148 DEPOT STREET  
HOLT, MI 48842

FOLD AND TEAR THIS WAY → OPTIONAL

Label #5 (OPTIONAL)

CC2022-0223  
9414 7266 9904 2200 6231 3  
DART CONTAINER CORPORATION  
2148 DEPOT STREET  
HOLT, MI 48842

Label #6 - Return Receipt Barcode (Sender's Record)



9590 9266 9904 2200 6163 48

Certified Article Number

SENDER'S RECORD

45 6163 2200 9904 7266

FOLD AND TEAR THIS WAY →  
RETURN RECEIPT REQUESTED  
USPS® MAIL CARRIER  
DETACH ALONG PERFORATION  
Thank you for using Return Receipt Service

# CERTIFIED MAIL® RECEIPT

Domestic Mail Only

USPS® ARTICLE NUMBER

9414 7266 9904 2200 6163 45

Certified Mail Fee	\$	Postmark Here
Return Receipt (Hardcopy)	\$	
Return Receipt (Electronic)	\$	
Certified Mail Restricted Delivery	\$	
Postage	\$	
Total Postage and Fees	\$	

Sent to:

DART CONTAINER CORPORATION  
2148 DEPOT STREET  
HOLT, MI 48842

TEAR ALONG THIS LINE

Reference Information

Common Pleas

CC2022-0223  
9414 7266 9904 2200 6231 3

PS Form 3800, Facsimile, July 2015

Label #7 - Certified Mail Article Number

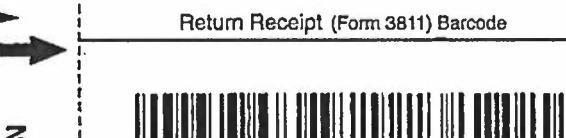
PLACE STICKER AT TOP OF ENVELOPE TO THE RIGHT  
OF THE RETURN ADDRESS. FOLD AT DOTTED LINE

**CERTIFIED MAIL®**



9414 7266 9904 2200 6163 45

FOLD AND TEAR THIS WAY →  
Return Receipt (Form 3811) Barcode



9590 9266 9904 2200 6163 48

1. Article Addressed to:

DART CONTAINER CORPORATION  
2148 DEPOT STREET  
HOLT, MI 48842

2. Certified Mail (Form 3800) Article Number

9414 7266 9904 2200 6163 45

COMPLETE THIS SECTION ON DELIVERY

- |                               |                                    |
|-------------------------------|------------------------------------|
| A. Signature                  | <input type="checkbox"/> Agent     |
| <b>X</b>                      | <input type="checkbox"/> Addressee |
| B. Received by (Printed Name) | C. Date of Delivery                |
- D. Is delivery address different from item 1?  Yes  
If YES, enter delivery address below:  No

3. Service Type:

Certified Mail

Reference Information

CC2022-0223  
9414 7266 9904 2200 6231 3

Thank you for using Return Receipt Service



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label 4: Sender's record of the Certified Mail Article Number

label 5: Sender address label or Charge Back information

label 6: Return Receipt Barcode (for sender's record)

label 7: PS Form 3800 Certified Mail sticker (affix at the top of the envelope with the perforation mark on the edge)

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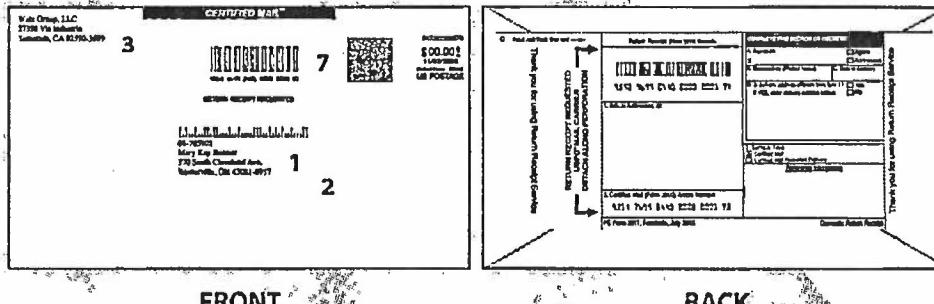
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MUSKINGUM COUNTY  
401 MAIN STREET  
ZANESVILLE OH 43701-3504

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Postage & Fees Paid  
USPS  
Permit No. G-10

DO NOT BEND VERTICAL PERFORATION

PEEL BACK TO EDGE

DO NOT BEND VERTICAL PERFORATION

**Court of Common Pleas, Muskingum County, Zanesville, Ohio**

**S U M M O N S**

Rule 4 1970 Ohio Rules of Civil Procedure

Case Number **CC2022-0223**

**KENNY TOUVELL  
10 OLD RIX MILLS ROAD, APT B2  
NEW CONCORD, OH 43762**

Plaintiff(s)

vs.

**Summons on Complaint**

**CIRCLE K STORES INC  
Corporation Service Company, Stat Agt  
3366 RIVERSIDE DIRVE, STE 103  
COLUMBUS, OH 43221**

Defendant(s)

FILED  
COMMON PLEAS COURT  
MUSKINGUM CO. OHIO  
2022 AUG -8 PM 2:50  
WENDY L. SOWERS  
CLERK

To the above named defendant(s):

You are hereby summoned that a complaint (a copy of which is attached and made a part hereof) has been filed against you in this court by the plaintiff(s) named herein.

You are required to serve upon the plaintiff(s) attorney, or upon the plaintiff(s) if (s)he has no attorney of record, a copy of your answer to the complaint within 28 days after service of this summons upon you, exclusive of the day of service. Said answer must be filed with this court within three days after service on plaintiff(s) attorney.

The name and address of the plaintiff(s) attorney is as follows:

MILES D FRIES  
Gottlieb Johnston, Beam & Dal Ponte, PLL  
PO BOX 190 / 320 MAIN ST  
ZANESVILLE, OH 43702

If you fail to appear and defend, judgment by default will be taken against you for the relief demanded in the complaint.

Wendy L. Sowers  
Clerk of Courts

Christie Boyd



Christie Boyd, Deputy Clerk

Date August 3, 2022

### Return of Service of Summons

#### **Personal**

I received this summons on August 3, 2022 and made personal service of it upon Amy Kuhlman, Circle K Stores Inc. by locating them and tendering a copy <sup>2022 AUG 8 PM 2:50</sup> of summons and accompanying documents on August 4, 2022. *WENDY L. SOWERS  
CLERK*

#### **Residence**

I received this summons on \_\_\_\_\_, 20\_\_\_\_ and made personal service of it upon \_\_\_\_\_ by leaving, at usual place of residence with \_\_\_\_\_ a person of suitable age and discretion then residing therein, a copy of the summons, a copy of the complaint and accompanying documents, on \_\_\_\_\_, 20\_\_\_\_.

#### **Failure of Service**

I received this summons on \_\_\_\_\_, 20\_\_\_\_ with instructions to make personal-residence service upon the defendant(s) \_\_\_\_\_ and I was unable to serve a copy of the summons upon \_\_\_\_\_ for the following reasons: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

\*\*Corrected Service Address (if served at different address): 3366 Riverside Drive,  
Suite 103, Upper Arlington, Ohio 43221.

Service By: Christopher J. Ulise  
Sheriff Deputy/Process Server/Deputy Clerk (circle one)

#### **Fees**

Service \$ \_\_\_\_\_ Mileage \$ \_\_\_\_\_ Total \$ \_\_\_\_\_ Date \_\_\_\_\_ / \_\_\_\_\_ /20\_\_\_\_\_.  
\_\_\_\_\_  
\_\_\_\_\_



9590 7266 9904 2200 6163 45

Article Addressed to:

ART CONTAINER CORPORATION  
148 DEPOT STREET  
OLT, MI 48842

Certified Mail (Form 3800) Article Number

9414 7266 9904 2200 6163 45

A. Signature	<input type="checkbox"/> Agent
X <i>[Signature]</i>	<input type="checkbox"/> Addressee
B. Received by (Printed Name)	
C. Date of Delivery	
D. Is delivery address different from item 1? <input type="checkbox"/> Yes If YES, enter delivery address below: <input type="checkbox"/> No	
COMM-FILED MUSKINGUM CO. COURT 2022 AUG 11 AM 10:28 WHDov/	
3. Service Type: CLERK <input checked="" type="checkbox"/> Certified Mail	
<u>Reference Information</u>	
CC2022-0223 9414 7266 9904 2200 6231 3	

USPS TRACKING #



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USPS  
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- Sender: Please print your name, address and ZIP+4® below •



**CLERK OF COURT OF COMMON PLEAS  
MUSKINGUM COUNTY  
401 MAIN STREET  
ZANESVILLE OH 43701-3504**

